

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUBEN PABLO, BONNIE COURSEY, and
JOHN BAHR,

No. C 08-03894 SI

Plaintiffs,

**ORDER RE: JURY INSTRUCTIONS
(CLASSIFICATION INSTRUCTION)**

v.

SERVICEMASTER GLOBAL HOLDINGS,
INC., et al.,

Defendants.

Both parties submitted proposed jury instructions on October 20, 2011. Plaintiffs also filed a letter asking the Court to immediately rule on certain proposed instructions prior to the start of trial on October 24, 2011. The two disputed categories of instructions in the letter are the “Classification of Work Activities & Activities Incidental to Sales” and “Drive Time.” Both issues go to the heart of the case, and are overlapping in their substance. Therefore, they will be considered together.

I. The Parties’ Competing Instructions

Defendants propose the following instructions:

Classification of Work Activities as Sales Related or Not: To determine whether Plaintiffs were outside sales people, you should itemize the types of activities that you consider to be sales related, and the approximate average times you find the Plaintiffs spent on each of these activities.

Activities Incidental to Sales: Selling or obtaining orders for services also includes other related activities, such as preparation, travel time, and paperwork.

Drive Time: If a salesperson must travel one hour to destination A in order to attempt

a sale, then you must count the hour of travel time as time spent “selling.” But if an employee travels to a destination to engage in both sales related and non-sales activities, if any, the travel time must then be apportioned among the two types of activities, for purposes of determining the total amount of time spent doing sales related and non-sales work.

Plaintiffs propose the following instructions:

Classification 1: You must decide whether each activity that each Plaintiff customarily and regularly performed during his or her work day was an outside sales activity or not. In order to do this, you must look at each activity objectively and in isolation and determine whether a person who performed only that activity would be a salesperson. Then, for each activity, you must decide the number of minutes or hours Plaintiff regularly and customarily spent during their workweek in the performance of that activity.

Classification 2 (Agreed): For a work activity to count as time spent performing outside sales activities, the activity must occur away from the employer’s place of business.

Classification 3: In determining whether an activity is a sales activity, you must apply the conventional meaning of the words that describe the activity.

Classification 4: You may not classify intrinsically non-sales work as sales activity.

Classification 5: In determining whether an activity is a sales or non-sales activity, the subjective intent of the Plaintiff during the activity is not relevant.

Drive Time: If an employee travels to a destination to engage in both sales and non-sales activities, if any, the travel time must be apportioned among the two types of activities for purposes of determining the total amount of time spent doing sales and non-sales work.

II. The Court’s Instruction

The Court finds that neither party has captured the distinctions set out in *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785, 801 (1999), the California Supreme Court case which apparently governs this removed case.

The Court proposes to instruct as follows on the classification issues.

Dated: October 22, 2011


 SUSAN ILLSTON
 United States District Judge:

STRUCTURAL PEST CONTROL FIELD REPRESENTATIVES

Plaintiffs were licensed as “Structural pest control field representatives.” As such they were licensed to (1) secure structural pest control work, (2) identify infestations or infections, (3) make inspections, (4) apply pesticides, and (5) submit bids for or otherwise contract on behalf of a registered company.

CLASSIFICATION OF WORK ACTIVITIES

To determine whether an employee was an outside sales person, you must identify the types of activities that employee customarily and regularly performed during his or her work day and then determine whether each such activity was an outside sales activity, or not. You must then determine the approximate average time you find the employee spent on each of these activities.

To determine whether an activity is an outside sales activity, you should consider the activity in isolation and determine whether a person who performed only that activity would be considered a salesperson. Related activity – such as preparation or paperwork – should be classified according to whether the underlying primary activity was an outside sales activity or not.

For a work activity to count as time spent performing outside sales activities, the activity must occur away from the employer’s place of business.

If an employee travels to a destination to engage in both sales and non-sales activities, the travel time must be apportioned between the two types of activities for purposes of determining the total amount of time spent doing sales and non-sales work.